No. 93-1611

(2)

Supreme Court, U.S.
FILED
MAY - 2 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1993

CHRISTINE M. WHITMAN, Individually, and as Executrix of the Estate of DAVID WHITMAN, Deceased, and as Parent and Natural Guardian of JASON R. WHITMAN, an Infant over the age of 14 years, KENNETH T. WHITMAN, an Infant over the age of 14 years, and LUCAS G. WHITMAN, an Infant under the age of 14 years,

Petitioners,

against

DAVID DONOGHUE, Individually and in his capacity as Commissioner of Public Works for the County of Broome, New York; C. DAVID WEST, Individually and in his capacity as Deputy Commissioner of Public Works, Highway Division for the County of Broome; EARL CARD, Individually and in his capacity as General Highway Crew Supervisor for the County of Broome; and the COUNTY OF BROOME,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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(3969—1994)
Printed on Recycled Paper

16 pp

Question Presented

Does the removal of a safety device from heavy machinery by a municipal employer some four months before an accident occurs where it is not claimed that the employer intentionally injured the employee give rise to liability under 42 U.S.C. §1983?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief in Opposition to Petition for a Writ of Certiorari

Statement

This case represents an attempt by petitioners to elevate a traditional state-law based claim for decedent's death to a level of constitutional deprivation.

On October 9, 1991, David Whitman died while working for the respondents, Broome County and the various supervisors within the County Department of Public Works. Mr. Whitman had been directed to clear debris from a creek bed in the vicinity of a culvert running under a county highway. He had *not* been directed to clear the culvert itself. Nevertheless, Mr. Whitman drove the bulldozer on which he was working into the culvert pinning himself between the seat and the top of the culvert causing his death.

In June of 1991, approximately four months prior to the accident, a large metal Rollover Protective Structure (hereinafter referred to as "ROPS") was removed from the subject bulldozer. Various officials of Broome County, including the named defendants, were either aware or should have been aware of the removal of the ROPS. The decedent himself was obviously aware of the removal of the ROPS and was the only operator of the bulldozer between June of 1991 and the date of his death.

The petitioners applied for and are receiving New York State Workers' Compensation benefits.

The complaint which has been dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) charges respondents with "willful", "knowing", "reckless", "deliberately indifferent" and "callous" conduct but contrary to the assertion in the Petition for Writ of Certiorari does *not* claim that the respondents *intentionally* injured the decedent.

Thus, it can be conceded that in the one sense the removal of the ROPS was intentional, i.e. the result of a purposeful decision to take it off the bulldozer. However, that is not the

same as "intentionally" causing the injury or even intentionally creating the conditions giving rise to the injury. Indeed, it was decedent who did that by unilaterally deciding to drive the bulldozer into the confined space.

It is respectfully submitted that the dismissal of the complaint by the District Court was correct in that the complaint does not state a claim under which relief can be granted. The Second Circuit Court of Appeals' unanimous affirmance is likewise correct. The Court should not grant certiorari for the reasons that follow.

Summary

The Petition for a Writ of Certiorari should not be granted. Respondents respectfully submit that the facts of this case do not give rise to liability under 42 U.S.C. §1983.

It is respectfully submitted that the issues with which this case is concerned have been sufficiently addressed in *Collins v. City of Harker Heights, Texas*, ____ U.S. ____, 112 S.Ct., 1061, 117 L.Ed.2d 261 (1991). The complaint in this action fails to state a claim on which relief can be granted because the conduct complained of is not arbitrary or "conscience shocking" in a constitutional sense. Thus, there is no substantive due process violation or other constitutionally sufficient theory upon which petitioners could prevail.

Furthermore, despite petitioners' claims to the contrary, there is no dispute among the lower courts. Since *Collins*, the lower courts have correctly applied that holding to the facts before them. While there may have been some confusion or inconsistency in deciding when a municipal em-

ployee validly sets forth a claim under 42 U.S.C. §1983, that ended with the decision in *Collins*.

When applied to the facts of this case, and not the facts of any other case or even facts which are not before the Court, the decisions of the United States District Court for the Northern District of New York and the Second Circuit Court of Appeals are correct. There is no constitutionally significant deprivation of this municipal employee's rights and the companion claims made pursuant to New York State Law are sufficient.

POINT I

The dismissal of the complaint was correct under *Collins v. City of Harker Heights, Texas* ____ US ____, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1991)

In 1991 this Court clarified the issue with which this case is concerned: under what circumstances does 42 U.S.C. §1983 provide a remedy for the death of a municipal employee? *Collins v. City of Harker Heights, Texas,* 112 S.Ct. 1061 at 1065.

As in the case at bar, *Collins* involved the death of an employee allegedly because of the culpable conduct of his municipal employers who, it was claimed, failed to provide proper training, safety warnings and, most relevantly, safety equipment. Here, it is claimed that the intentional removal of such safety equipment, the ROPS, was the cause of Mr. Whitman's death.

To prevail, however, petitioners would have to show that their harm and the death of Mr. Whitman was the result of a constitutional violation. *Collins,* 112 S.Ct. at 1066. This would require a showing that petitioners' substantive due process rights were violated.

Neither the complaint in *Collins* nor the complaint before the Court charge the municipality with deliberately or intentionally harming the employee. While it is true that this complaint alleges the "intentional" removal of the ROPS, this was done some four months before the fatal accident during which time Mr. Whitman operated the bulldozer without incident or apparent protest (as indeed such protest clearly would have been alleged had it been made). Thus, we are left with a complaint which fairly analyzed suggests two theories of liability: a failure to provide a safe place to work and conduct which "shocks the conscience" of the Court. *Collins,* 112 S.Ct. at 1069.

This Court has repeatedly held that the Due Process Clause does not supplant traditional tort law concepts based on state-law determinations of negligence or other culpability. *Daniels v. Williams,* 474 U.S. 327, 332, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Baker v. McCollan,* 443 U.S. 137, 146, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979); *Collins,* 112 S.Ct. at 1070. The State of New York has legislatively dealt with this particular aspect of the employer-employee relationship. New York State Labor Law, Article 7 *(McKinney's Consolidated Laws of New York,* Vol. 30, 1986, as amended), New York State Workers' Compensation Law *(McKinney's Consolidated Laws of New York,* Vol. 64). Thus, as the Court has pointed out, state-law, rather than the Federal Constitution, generally governs the substance of the employment relationship. *Collins,* 112 S.Ct. at 1070.

These facts may be contrasted with events which clearly *would* create §1983 liability. These include claims in which an employee is assigned a particularly hazardous task because of her color, political affiliation or on the basis of some other constitutionally impermissible basis. *Collins,* 112 S.Ct. at 1065; *Poulssen v. City of North Tonawanda,* 811 F.Supp. 884 (WD N.Y. 1993).

However, in this case the issue before the Court is the same issue which it addressed in *Collins*. The Court held that the Due Process Clause does not guarantee a work place free from unreasonable risks of harm or ill-advised personnel decisions. *Collins,* 112 S.Ct. at 1070. This is true whether the employer is public or private since by voluntarily accepting municipal employment an employee does not surrender rights to which he may be entitled. But, neither should he gain rights just because his employer is the government.

This complaint does not establish facts which demonstrate harm caused by a *constitutional* violation and was therefore properly dismissed pursuant to FRCP §12(b)(6). The issues and questions raised in the Petition for a Writ of Certiorari, while important, have already been addressed and answered in *Collins*.

POINT II

There is no conflict among the lower courts on the issue of liability under 42 U.S.C. §1983 for injuries to municipal employees

Petitioners have endeavored to create a controversy which does not exist. The Petition for a Writ of Certiorari begins with a question which doesn't even accurately set forth the issue before the Court and ends with a hyperbolic prediction of dire consequences. By broadening the scope of the "Question Presented" to *all* individuals rather than the municipal employees with which this action is concerned, petitioners inject irrelevant and non-dispositive components to the resolution of this case.

There isn't a single decision by a Court of Appeals which is at odds with another Court of Appeals or with this Court's decision in *Collins v. City of Harker Heights, Texas, supra.*

It is significant that of all the cases cited by petitioners which are claimed to be in conflict, all but *one* were decided before *Collins*. *Nishiyama v. Dickson County Tennessee*, 814 F.2d 277 (6th Cir., 1987); *White v. Rochford*, 592 F.2d 381 (7th Cir., 1979); *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir., 1989).

Presumably, after this Court decided *Collins*, these courts would review if not decide the above cases differently. Indeed, that is exactly what the 7th Circuit has done. In *Reilly v. Waukesha County Wisconsin*, it was held that "the due process clause does not create an entitlement to low-risk

employment". 993 F.2d 1284, 1286 (7th Cir., 1993) citing *Walker v. Rowe,* 791 F.2d 507 (7th Cir., 1986).

It should also be noted that many of the cases cited by petitioners do not involve employees of municipalities. Rather, they involve non-affiliated third persons. This is significant since petitioners have consistently ignored this distinction. Indeed, petitioners have in essence tried to expand the issue before the Court by framing their "Question Presented" in terms of *all persons* rather than municipal employees, the group of people with which this action is concerned. Thus, while it is clear that the Federal Constitution affords protection to governmental employees as well as those whom they serve (*Collins,* 112 S.Ct. at 1066), the conduct under review is necessarily governed by the operative facts of the case to determine if a liberty or other constitutionally protected interest has been injured. *Collins,* 112 S.Ct. at 1071. We submit, therefore, that cases involving injuries to third persons such as those in government custody, those for whom a special duty exists and others are not before the Court and those holdings are of limited precedential value.

While it is true that *L.W. v. Grubbs,* (974 F.2d 199, 9th Cir. 1992) was decided after *Collins* and that certiorari was denied by this Court (____ U.S. ____, 113 S. Ct. 242, 124 L.Ed.2d 660, 1992), that case is critically different from the case presently under consideration.

Significantly, the appeal in *Grubbs* involved a very narrow, and concededly erroneous, holding by the District Court that to prevail plaintiff had to be "in official custody to state a §1983 claim". 974 F.2d at 120. Furthermore, the defendants claimed, also erroneously, that plaintiff's status

as an employee barred her claim. *Id.* Finally, it must be recalled that the conduct of the municipality had immediate impact, i.e. the prison officials placed plaintiff in immediate danger by forcing her to work with a dangerous inmate *after* giving specific assurances of safety by using "their authority as state correctional officers." 974 F.2d at 121. Thus, the danger created was immediate and predictable, not removed by some four months. Moreover, the only way the plaintiff could have been injured was because defendants were "acting in their capacity as state correction officers" (*Grubbs*, 974 F.2d at 123), a uniquely governmental function. Here the injury was not even remotely proximate to the removal of the ROPS, was not the result of a uniquely governmental function, and, most importantly, was really the result of the intervening act of decedent in driving the bulldozer into the confined space, apparently of his own volition but in any event without any direction or control by his municipal employers. *McClary v. O'Hare*, 786 F.2d 82, 89 (2d Cir., 1986).

Clearly, therefore, there is no conflict among the lower courts on this issue. Indeed, most of the lower courts had, prior to *Collins*, decided this issue exactly as this Court did. *deJesus Benavides v. Santos*, 883 F.2d 385 (5th Cir., 1989); *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir., 1986); *McClary*, 786 F.2d 83 (2d Cir., 1986).

Other circuits deciding similar but not identical issues, have used *Collins* to set forth the standard in reviewing §1983 claims. *Doyle v. Oklahoma Bar Association*, 998 F.2d 1559 (10th Cir., 1993) (conduct not "conscience shocking" in constitutional sense); *Searles v. SEPTA*, 990 F.2d 789 (3rd Cir., 1993).

Searles is significant because of the manner in which it correctly demonstrates the need for a constitutional and *de facto nexus* between the conduct of the municipality and the harm. The 3rd Circuit dismissed the complaint in *Searles*, in part, because the injury was not "directly caused by a state actor's affirmative act in the traditional sense." 990 F.2d at 789. There, as here, as in *Collins*, the affirmative act of the municipality is so far removed in time or logic as to be of little consequence in causing the injury. *Searles*, 990 F.2d at 793. See also: *Martinez v. California*, 444 U.S. 277, 100 S.Ct., 553, 62 L.Ed.2d 481 (1980).

Therefore, while respondents concede the importance of the issue of constitutional protection for municipal employees, it is respectfully submitted that the body of law now existing, especially in *Collins*, has addressed the issue sufficiently in a general sense and especially in the specific sense of answering the questions presented under the unique facts of this case. Certiorari need not, and should not, be granted.

Conclusion

The facts of this case present a tragic accident not a constitutionally based claim under 42 U.S.C. §1983. The Due Process Clause of the Federal Constitution does not protect employees, public or private, from ill-advised personnel decisions or the failure of their employers, municipal or otherwise, to provide them with a safe place to work.

However, this does not leave these petitioners without a remedy. Since the employment relationship is traditionally state-law based, state-law remedies are available to compensate them for their loss. Petitioners have applied for and accepted New York State Workers' Compensation benefits and may or may not have a third-party claim against someone other than Mr. Whitman's municipal employer.

The act of removing the ROPS for what petitioners concede was a legitimate if not ill-advised reason, some four months before this accident occurred does not give rise to liability under the Federal Constitution. This conduct while actionable under state-law is not arbitrary or conscience shocking in a constitutional sense. Indeed, it is important to recall that decedent himself was the exclusive operator of this arguably defectively equipped bulldozer and that it was he, himself, who drove it into the confined space of the culvert.

Moreover, while the issue of municipal liability for constitutional harm inflicted upon governmental employees is important, it has already been adequately if not definitively addressed by this Court in *Collins*. No conflict exists among the lower courts which can now use *Collins* to correctly apply this rule of law to achieve correct and constitutionally just results. Certiorari should not be granted and the Petition dismissed.

Respectfully submitted,

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